United States Court of Appeals

for the Second Circuit

APPENDIX

75-7316

United States Court of Appeals
FOR THE SECOND CIRCUIT

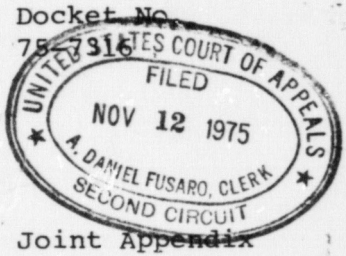
B

Roger diLeo
Appellant

vs.

Richard Greenfield
et al
Appellees

Docket No.
75-7316



Joint ~~Appendix~~

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PAGINATION AS IN ORIGINAL COPY

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Relevant Docket Entries

DATE	PROCEEDINGS
9/13/73	Complaint, filed. Summons issued and together with same and copies of complaint handed to Marshal for service.
12/17/73	Answer filed.
1/10/74	Notice & Motion for Summary Judgment filed by Plaintiff.
3/13/74	Motion for Summary Judgment filed by Defendant.
3/28/74	Ruling on Cross Motions for Summary Judgment filed. Clarie, J. m. 3/29/74 Copies mailed to counsel of record (New Hearing for Plaintiff within 30 days).
4/3/74	Plaintiff's Motion for Reconsideration. "The Plaintiff's motion for reconsideration and/or certification for interlocutory appeal under 28 USC §1292 (b) is DENIED; SO ORDERED. Clarie, J. m 4-5-74. Copies mailed to counsel of record.
10/15/74	Plaintiff Renewed Motion for Summary Judgment

Relevant Docket Entries (Contd.)

DATE	PROCEEDINGS
2/4/75	Final Ruling on Cross Motions for Summary Judgment, Clarie, J. m 2-5-75. (complaint dismissed). Copies mailed to counsel.
3/31/75	Hearing on Damages.
4/25/75	Ruling on Hearing in Damages.
4/28/75	Judgment entered Markowski, J. m 5-2-75. Copies mailed.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROGER diLEO Plaintiff	)	
VS.	)	CIVIL ACTION NO. H-162
RICHARD GREENFIELD, SHIRLEY KLIGERMAN, EUGENE SWEENEY, DANIEL ARNOLD, DONALD HARRIS, BARRY GREENE, ALL MEMBERS OF THE BLOOMFIELD BOARD OF EDUCATION, AND HERBERT CHESTER, SUPERINTENDENT OF BLOOMFIELD SCHOOLS Defendants	)	COMPLAINT

1. This is an action to redress the deprivation under color of §10-151(b) Conn. Gen. Stats. of due process rights secured to the Plaintiff by the Fourteenth Amendment to the Constitution of the United States in which the civil liability of the Defendants arises from 42 U.S.C. §1983 and in which jurisdiction is therefore conferred upon this Court by 28 U.S.C. §1343.

2. The Plaintiff is a citizen of the United States resident in Hartford, Connecticut who prior to the events alleged in this complaint had acquired tenure as a teacher in the employ of the Bloomfield Board of Education as the word "tenure" is used in connection with §10-151 Conn. Gen. Stats.

3. The first six named Defendants are residents of Bloomfield Connecticut and members of the Bloomfield Board of Education. Under Connecticut law board members serve as agents of the state in their community, and the responsibility delegated to them by the legislature is to maintain the public schools of the town. The Defendant Chester is employed by them as Superintendent of schools and is also a resident of Bloomfield. The actions of all Defendants alleged in this complaint came in their official capacities.

4. On June 21, 1973 the Defendant Chester wrote to the Plaintiff a letter whose complete text is as follows:

> This letter is official notification of your dismissal from the Bloomfield School System effective at the end of this present school year.
>
> This action is taken on the basis of unprofessional conduct on your part in the performance of your duties. Specifically, after two conferences with you in regard to your relationship with students, and being cautioned by Mr. Cronin and myself, you continued to evidence poor practices in your relationship to students.

5. In response to said letter the Plaintiff, by letter dated June 26, 1973, requested a hearing before the Board of Education as provided for in §10-151[b) Conn. Gen. Stats. and included in his letter the following request for information about the charges against him:

> Your letter is too general in its statement for me to understand the nature of the reasons for the action. Will you please advise me of the following:
>
> (a) Where, when and with whom were the two conferences supposedly held between myself and others regarding my relationship with students?

(b) What was said by each participant?

(c) When did each of you and Mr. Cronin caution me?

(d) What was the caution which you gave me?

(e) What poor practices in my relationship to students do you claim that I have evidenced?

(f) What witnesses are there as to any improper conduct on my part?

6. On July 2, 1973 the Defendant Chester purported to respond by a letter whose complete text is as follows:

> The Board of Education is meeting tomorrow evening (July 3, 1973) and at that time they will establish a date for the hearing and you will receive notification.
>
> Your dismissal is predicated on §10-151(b)(6) "other due and sufficient cause", specifically, improper conduct towards students on several occasions.

7. Thereafter the Bloomfield Board of Education held a hearing to consider Plaintiff's dismissal on July 10, 1973 and continued said hearing to July 23, 1973. A transcript was made which will be submitted to the Court.

8. Following the conclusion of the hearing as continued, the Defendant Greenfield notified the Plaintiff's attorney by a letter dated August 1, 1973 whose complete text is as follows:

> Please be advised that pursuant to §10-151(b) of the Connecticut General Statutes, following the hearing held by the Bloomfield Board of Education on July 23, 1973, the Board voted to terminate Mr. diLeo's employment with the Bloomfield Public Schools.
>
> As soon as a copy of the transcript of the hearing is received from the recorder it will be forwarded to you.

9. The actions of the Defendants alleged above have deprived the Plaintiff of his rights of due process secured to him under the Fourteenth Amendment to the Constitution of the United States in the following respects:

a. Section 10-151(b)(6) Conn. Gen. Stats., upon which the Defendant Board members rested the dismissal is so vague that the Plaintiff had insufficient notice to permit him to conform his conduct as a teacher to its standard of "other due and sufficient cause."

b. The letters of June 21, 1973 and July 2, 1973 quoted in paragraphs 4 and 6 above, failed to give him sufficient notice of the charges against him to enable him to prepare for the hearing.

c. During the course of the hearings held July 10, 1973 and July 23, 1973 the Defendant Board members received into evidence hearsay statements relating to the alleged conduct and competence of the Plaintiff over the objection of counsel for the Plaintiff. The evidence was on issues critical to the termination decision and there was readily available testimony which could have been obtained by the Board from the underlying declarants. The Plaintiff requested and was denied access

to progress reports, academic progress records and disciplinary records relating to some of the absent declarants. Thus, the Board relied upon unreliable evidence and the Plaintiff was denied the opportunity to confront and cross-examine the real witnesses against him.

d. The letter of August 1, 1973 advising the Plaintiff, through his attorney, of the termination decision does not identify any grounds for the Board's action.

10. As a result of the termination of his employment, the Plaintiff has been denied the opportunity to continue teaching for the academic year 1973-74, for which his salary had been fixed at $12,654, and the opportunity to continue in said employment for subsequent years for amounts of not less than that. He has further suffered harm to his professional career and reputation.

WHEREFORE, the Plaintiff respectfully requests as relief a judgment of this Court which:

a. declares his termination illegal;
b. requires his reinstatement;
c. awards him damages in the amount of his lost wages and for his damaged professional reputation; and
d. awards him costs, reasonable attorneys's fees, and such further relief as the Court may deem proper.

Dated at Hartford, Conn., this 11th day of September, 1973.

Plaintiff

by Karl Fleischmann
Karl Fleischmann
Satter, Fleischmann & Sherbacow
His attorneys.

We hereby enter our appearance for the Plaintiff in the above entitled action.

Karl Fleischmann
Karl Fleischmann
Satter, Fleischmann & Sherbacow

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF CONNECTICUT

ROGER di LEO	:	CIVIL ACTION FILE NO. H-162
Plaintiff	:	
VS.	:	
RICHARD GREENFIELD, SHIRLEY KLIGERMAN, EUGENE SWEENEY, DANIEL ARNOLD, DONALD HARRIS, BARRY GREENE, ALL MEMBERS OF THE BLOOMFIELD BOARD OF EDUCATION, AND HERBERT CHESTER, SUPERINTENDENT OF BLOOMFIELD SCHOOLS	:	
Defendants	:	December 13, 1973

ANSWER

1. As to the allegations of Paragraphs 1, 2 and 10, the defendants are without knowledge or information sufficient to form a belief as to the truth thereof and, therefore, leave the plaintiff to his proof.

2. Paragraphs 3, 4, 5, 7 and 8 are admitted.

3. Paragraphs 6 and 9 are denied.

LEO ROSEN
Attorney for the Defendants
750 Main Street
Hartford, Connecticut 06103

CERTIFICATION

This is to certify that a copy of the foregoing was mailed this 13th day of December, 1973 to Karl Fleischmann, Esquire, Satter, Fleischmann & Sherbacow, 60 Washington Street, Hartford, Connecticut and Thomas Sullivan, Esquire, Vause & Sullivan, 410 Asylum Street, Hartford, Connecticut.

LEO ROSEN

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROGER diLEO, Plaintiff	)	
	)	CIVIL ACTION NO. H-162
VS	)	
	)	MOTION FOR SUMMARY JUDGMENT
RICHARD GREENFIELD, ET AL, Defendants	)	

In accordance with Rule 56, Fed. R. Civ. Proc., the Plaintiff claims that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law.

Dated at Hartford, Connecticut, this 9th day of January, 1974.

PLAINTIFF

By_____
Karl Fleischmann
Satter, Fleischmann & Sherbacow,
His Attorneys

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing has this day been mailed to Leo Rosen, Esq., 750 Main Street, Hartford, Conn.

_____
Karl Fleischmann
Commissioner of the Superior Court

NOTICE OF MOTION

Please take notice that the undersigned will bring this motion on for hearing before the United States District Court at 450 Main Street, Hartford, Connecticut, on Monday, January 28, 1974, at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard.

Dated at Hartford, Connecticut, this 9th day of January, 1974.

PLAINTIFF

By_____
Karl Fleischmann
Satter, Fleischmann & Sherbacow,
His Attorneys

[Doc. 7, pg. 1]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROGER diLEO :
-vs- : Civil Action No. H-162
RICHARD GREENFIELD, et al :

RULING ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

The plaintiff, a tenured teacher, formerly employed in the Bloomfield, Connecticut public school system, has brought this civil rights action against the individual members of the Bloomfield Board of Education and that Town's Superintendent of Schools. He seeks a declaratory judgment to the effect that he was unlawfully terminated from his teaching position by the defendants, reinstatement to his former position, and monetary damages to compensate for his lost wages and resulting injury to his professional reputation. The parties have each filed cross-motions for summary judgment pursuant to Rule 56(a) and (b), Fed. R. Civ. P. Both motions are denied without prejudice.

A recitation of the facts is unnecessary for the purposes of this ruling. The dispute focuses clearly and sharply upon the content of an in-class verbal exchange between the plaintiff teacher and Miss Dori Ann Janis, a fourteen year old pupil in his Spanish class. The defendants' version of the facts surrounding the verbal exchange, based upon the testimony of Mrs. Janis, mother of Dori Ann, at a hearing before

the Bloomfield Board of Education on July 10, 1973, is as follows:

> ". . . Mr. DiLeo apparently told the children not to come up to his desk. I don't know what he was doing up there, but she had a question and she is persistent and went.
>
> "He said to her, you know, to go back to her seat, I am not going to help you. She said, 'You have got to help me, that is what you are here for.' He said to go back to her seat. She went back to her seat and then he stood and came to the front of the class and he said, 'Miss Janis, you can tell your mother to go to hell, your father to go to hell, your friends to go to hell, you can tell the principal to go to hell." (Emphasis added). (Tr. 57).

The plaintiff's version of this same experience is strikingly different. According to him, the incident occurred at a time when the "classes were passing." Plaintiff testified:

> "I told DoriAnn Janis who was up at my desk, to take her seat. After I got class started I would hear her problem, her question. She didn't want any part of that. She wanted her problem taken care of right then and there.
>
> "I insisted that she take her seat and she did very unhappily. When she was at her seat, she mumbled various things, which I did not hear. One that I did hear was that you can go to hell, to me. I could have chosen not to respond to it or to respond to it. I chose to respond to that statement of hers.
>
> "So, then what I said . . . was this.
>
> . . . .
>
> '". . . Miss Janis, maybe you tell your mother to go to hell, maybe you tell your father to go to hell, maybe you tell your friends to go to hell, but you are not going to tell me to go to hell.'" (Emphasis added). (Tr. 113).

The testimony developed at the hearing before the Board of Education was not limited to the particulars of this one incident. It encompassed prior happenings related to this teacher, which allegedly indicated an overall deterioration in teacher-student relationship. The incident between Miss Janis and the plaintiff appears to have been an important factor, which precipitated the Board's decision to take the termination action when it did. Unfortunately, the pupil, Miss Janis, did not testify at the hearing, and the Board was therefore denied the opportunity to weigh the plaintiff's testimony against that of his accuser, to whom the remark was allegedly made. The plaintiff denies having told Miss Janis to "go to hell," but claims merely to have used that phrase in an altogether different context, and a sharp conflict in credibility exists.

It is well settled that summary judgment is not warranted simply because all parties have filed cross-motions, representing that there are no genuine issues of material fact and that each is entitled to judgment as a matter of law. Walling v. Richmond Screw Anchor Co., 154 F.2d 780, 784 (2d Cir.), cert. denied, 328 U.S. 870 (1946). "Good sense and sound theory, if these be distinguishable, combine to produce the rule. Good sense, because neither a single motion nor multiple motions can dissipate factual issues." 6 J. Moore

Federal Practice ¶ 56.13, at 2248 (1971 ed.). See also American Mfg. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 278-280 (2d Cir. 1967); Union Insurance Society v. Gluckin & Co., 353 F.2d 946, 952 (2d Cir. 1965). "Sound theory . . . because a party entitled to summary judgment must bear the burden of establishing the indisputability of the facts which warrant judgment in his favor." 6 J. Moore, Federal Practice, supra. The defendants have clearly failed to sustain this burden.

In a situation such as this, where the exact words used are crucial and where a person stands to lose both his position and standing within professional circles, basic principles of fairness require that fact-finders have the opportunity to base their decision on first-hand testimony. Too much may be lost in the "translation" of hearsay repeated to permit the parents of the complaining students in question to testify on behalf of their children, absent any exceptional circumstances, which do not exist here. 1/

> ". . . there is nothing to indicate that the Board had any valid basis for dispensing with confrontation of the accusing witness or his cross-examination. Since critical facts were in dispute and since their resolution could lead to expulsion, the lack of confrontation and cross-examination, in the absence of any justifying circumstances, denied plaintiff due process of law." DeJesus v. Penberthy, 344 F. 70, 76 (D. Conn. 1972).

1/ The Superintendent of Schools expressed reluctance to bring to the hearing students of Junior High School age (12-13 years).

The plaintiff in the present case does not, of course, have the burden or proving that he did not make the alleged disparaging and uncalled for remarks, which were the subject of the hearing before the Board of Education. In a technical sense, he need only establish a violation of his constitutional right to procedural fairness in order to be entitled to a declaration that his termination denied him his right to due process of law. The plaintiff, however, has sought reinstatement to his teaching post and monetary damages, as well as a declaratory judgment that he was denied procedural due process.

Furthermore, the Board has not indicated what factual findings it made on the controversial issues, which might support its decision to terminate the plaintiff's tenure. Whether or not its actions relied upon adverse findings against diLeo on the "Janis, DeLorenzo and Holbrook" incidents is not clear; it may have relied solely on other evidence in the case, relating to his alleged lack of professional attitude.

> "A second infirmity of the Board's procedures in this case concerns the absence of findings. The expulsion vote came on a motion that failed to identify any grounds for the Board's action. It was simply a motion to expel. It has long been a principle of administrative law that agency action must rest on a specified basis 'set forth with such clarity as to be understandable.' S.E.C. v. Chenery Corp., 332 U.S. 194, 196, 67 S.Ct. 1575, 1760, 91 L.Ed. 1995 (1947). And reviewing courts must judge the propriety of administrative action 'solely by the grounds invoked by the agency.'" DeJesus v. Penberthy, supra at 76.

The circumstances of the present case require that any summary judgment ruling which would either affirm the Board's actions or reinstate the plaintiff, be held in abeyance until the Board of Education of the Town of Bloomfield has had the oppo: unity to hold a new hearing consistent with the criteria set forth in DeJesus v. Penberthy, supra.

Accordingly, the parties' cross-motions for summary judgment are denied without prejudice, and the defendants are ordered to give the plaintiff a new hearing within thirty (30) days.

SO ORDERED.

Dated at Hartford, Connecticut, this 28th day of March, 1974.

T. Emmet Clarie
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROGER dILEO :

-vs- : Civil No. H-162

RICHARD GREENFIELD, et al :

FINAL RULING ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

This case comes before the Court on the plaintiff's renewed motion for summary judgment, pursuant to Rule 56, Fed. R. Civ. P. The parties represent that there are no genuine issues of material facts to be litigated and that each is entitled to judgment as a matter of law. The plaintiff was a tenured teacher in the Bloomfield School System, who alleges that he was not afforded procedural due process of law, because his employment was unlawfully terminated under § 10-151(b)(6), Conn. Gen. Stat. He claims that: (1) the state statute is unconstitutional because it is too vague, and did not permit him to conform his conduct as a teacher to the required educational standards; (2) the particulars specified in the Board's official notices of June 21 and July 2, 1973, were inadequate and they failed to afford him sufficient notice of the charges; (3) the School Board meetings of July 10 and July 23, 1973, unlawfully permitted the admission of hearsay evidence against him on critical issues; (4) student records of

the complaining witnesses were denied to him, so that he was unable to confront and properly cross-examine witnesses who testified against him; and (5) the Board's letter of dismissal on August 1, 1973, did not identify lawful grounds for the Board's dismissal action. The plaintiff now requests that the Court find that his job termination was illegal. He would have the Court reinstate him to his former position, grant an award of damages for lost wages to date and money damages for loss to his professional reputation, together with an allowance for costs and attorney's fees. The Court finds that the plaintiff was afforded an adequate hearing on May 20, 1974 and June 5, 1974 and due process of law; accordingly, his complaint is dismissed and the relief requested is denied, except that the plaintiff shall be entitled to recover actual loss of salary during the period beginning with the date of the attempted unlawful termination, to the date of the lawful termination, June 18, 1974.

Background

This suit was originally brought by the plaintiff on September 13, 1973, under the authority granted in the Civil Rights Act, 42 U.S.C. § 1983. He claims, that as a tenured teacher in the Bloomfield Public School System, he was unlawfully terminated from his position in the language department of the junior high school. He represents that he was

deprived of a fair hearing and denied due process rights guaranteed to him under the fourteenth amendment to the federal constitution, because the School Board failed to properly advise him of the specific charges as provided under § 10-151(b) of the Connecticut General Statutes. Subject matter jurisdiction is authorized under 28 U.S.C. § 1343.

The state tenured teacher statute applicable here, § 10-151(b) provides:

> "Beginning with and subsequent to the fourth year of continuous employment of a teacher by a board of education, the contract of employment of a teacher shall be renewed from year to year, except that it may be terminated at any time for one or more of the following reasons: (1) Inefficiency or incompetence; (2) insubordination against reasonable rules of the board of education; (3) moral misconduct; (4) disability, as shown by competent medical evidence; (5) elimination of the position to which the teacher was appointed, if no other position exists to which he may be appointed if qualified; or (6) other due and sufficient cause; provided, prior to terminating a contract, a board of education shall give the teacher concerned a written notice that termination of his contract is under consideration and, upon written request filed by such teacher with such board within five days after receipt of such notice, shall within the next succeeding five days give such teacher a statement in writing of its reasons therefor. Within twenty days after receipt from a board of education of written notice that contract termination is under consideration, the teacher concerned may file with such board a written request for a hearing, which such board shall hold within fifteen days after receipt of such request. Such hearing shall be public if the teacher so requests or the board so designates. The teacher concerned shall have the right to appear with counsel of his choice at such hearing, whether public or private. . . . ."

The state law provides that any aggrieved teacher has the right to appeal the Board's decision, within thirty (30) days from the date thereof, requesting a judicial review by the State Court of Common Pleas for the county or judicial district in which the board is located. No such state appeal was ever filed in this case.

The literal letter of the statutory state law, which provides for dismissal procedures for a tenured teacher such as the plaintiff, was not initially followed by the superintendent of schools. No written notice was first given, stating that contract termination was under consideration. However, the practical effects which followed after the June 21, 1973 dismissal notice, did not thereafter materially affect the sequence of hearing procedures which followed, as provided by law. (Defendant's Exhibit 1).

The plaintiff, by his letter of June 26, 1973, promptly requested a hearing before the School Board on the charges pursuant to § 10-151(b), Conn. Gen. Stat. He demanded that the Board particularize in writing the alleged unprofessional conduct of which he was accused and specify the poor practices claimed in his relationship with the students. The plaintiff simultaneously advised in that same letter that he had retained legal counsel, who would represent him in all future matters connected with his alleged unlawful firing. (Defendant's Exhibit 2).

The Bloomfield Board of Education scheduled a hearing on July 10, 1973, at which the plaintiff with his counsel appeared, together with an observer from the American Federation of Teachers. At no time prior to the commencement of the hearing itself, did the plaintiff or his counsel protest on the record that there was any defect in the notice of dismissal. Neither did counsel request a delay because he considered the inadequacy of the notice given to prejudice his ability to defend against the accusations and charges. In fact, the plaintiff's counsel actively participated in the hearing and cross-examined the witnesses, who testifed at the July 10th and July 23rd Board hearings. The transcript of the continued hearing on July 23, 1973, was 172 pages long, compared with the 73 pages at the first hearing. The plaintiff's counsel during that intervening period had an adequate opportunity to weigh and evaluate the case against his client and to fully prepare his defense. He not only cross-examined the witnesses, but also called witnesses in behalf of his client, including the plaintiff, who testified at length at the July 23rd hearing.

On August 1, 1973, the Chairman of the Board, Richard Greenfield, notified the plaintiff's attorney by letter that the Board had voted to terminate the plaintiff's employment with the Bloomfield Public Schools.[1/] It further advised that

a copy of the hearing transcripts would be forwarded, upon their receipt from the recorder. The plaintiff thereupon filed this court action on September 13, 1973, claiming inadequate notice of the charges, the admission of prejudicial hearsay statements, and failure of the Board to make factual findings to justify its action.

At the first court hearing, the parties filed cross-motions for summary judgment basing the claims on inadequate notice of the charges, the admission of remote hearsay evidence, and an absence of findings upon which the Board's dismissal action was based. The Court found that one phase of the critical testimony offered, against the teacher charged him with using improper and unsavory language toward one of his pupils, and that this evidence was totally based on hearsay. Furthermore, it materially detracted from the plaintiff's professional reputation as a classroom teacher and could make it difficult for him in the future to get other employment and pursue his chosen profession in life. Where government employment is involved, the reasons for separation could have important consequences in obtaining future employment and damage his standing and associations in his community.

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

Also see, McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973).

Basic fairness requires that the Board and the teacher should have the opportunity to confront and cross-examine the complaining witnesses. No valid reason exists why students of junior high school age should not be considered as having the maturity to testify for themselves. Their personal involvement was already apparent by their submission of a written petition to the superintendent. It indicated their willingness to act without personal embarrassment or harmful emotional sensitivity.

[The Discussion of Factual Issues which covers pages 7 through 22 of this final ruling is omitted as it has no bearing upon this appeal.]

Discussion of Law

The Court's function in this case involves procedural due process; its authority is not administrative in nature, but judicial. The Board on the other hand, in this instance, is an administrative agency acting in a quasi-judicial capacity. The Court has no right to set the standards of policy concerning the competency of teachers employed in the Bloomfield School System. Those are the School Board's duties and they require evaluation of personnel, enlightened teacher supervision and continuing executive direction of the school's programs designed to accomplish declared educational objectives. In carrying out its task, the Board's primary duty is to provide excellence in education, for the children it teaches.

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . .. By and large, public education in our Nation is

> committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (footnote omitted).

However, the dismissal of a tenured teacher must have some factual and rational relationship to the improvement of the educational system and must be carried out within the structure of state law, with sensitivity at all times to the observance of constitutional due process.

> "A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown." Perry v. Sindermann, 408 U.S. 593, 601 (1972).

The Connecticut law, § 10-151(b), Conn. Gen. Stat., sets out the guidelines for teacher removal procedures. The plaintiff-teacher alleges that this procedural due process as prescribed was not afforded him and that because of its vagueness the statute itself does not provide substantive due process. The procedural claim is based on the representation that the Board did not give him adequate notice of the specific reasons for his dismissal.

> ". . . . The Fourteenth Amendment forbids the State to deprive any person of life, liberty or property without due process of law. Protected interests in property are normally 'not created by the Constitution. Rather, they are created and

> their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
>
> "Accordingly, a state employer who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process. Connell v. Higginbotham, 403 U.S. 207 (1971); Wieman v. Updegraff, 344 U.S. 183, 191-192 (1952); Arnett v. Kennedy, 416 U.S. 134 (1974) . . . ." Goss v. Lopez, 43 U.S.L.W. 4181, 4183 (Jan. 22, 1975).

The plaintiff claims that the state statute under which he was charged, § 10-151(b)(6) is unconstitutional because of vagueness. While sub-section (b)(6), which reads "other due and sufficient cause" standing alone is vague, the remaining portion, which must be considered in the whole, provides that upon request the Board "shall within the next succeeding five days give such a teacher a statement in writing of its reason therefor."

In fact Defendant's Exhibit 1, the superintendent's letter of employment termination, sets out the nature of the charges when it said:

> "This action is taken on the basis of unprofessional conduct on your part in the performance of your duties. Specifically, after two conferences with you in regard to your relationship with students, and being cautioned by Mr. Cronin and myself, you continued to evidence poor practices in your relationship to students." (Emphasis added).

While an experienced lawyer's specifications might have been narrowly drawn and pointedly stated, the plaintiff personally knew what he had recently discussed in conference with the principal and the superintendent about his attitude and conduct. After reading the letter, he was fully aware of what was at issue. Even accepting, arguendo, the plaintiff's claims that the notice and specifications prior to the first hearing were not sufficiently explicit to enable him to prepare for that hearing, certainly this could not be said as to the second set of hearings ordered by the Court. Furthermore, at the conclusion of the latter hearings the Board offered to adjourn to an indefinite date and allow the plaintiff such additional time as he might require to prepare a defense. The plaintiff's counsel refused the offer of a continuance. In so doing, the Court finds that he waived any valid claim to any imperfection in the adequacy of the notice of hearing or any prejudice that might be legitimately claimed in preparing his defense.

The Board chairman requested that the plaintiff take the witness stand and testify in his own defense, but his counsel refused to permit him to do so. (Tr. 255). The Court finds from the overall circumstances that the plaintiff's defense was not materially impeded and any inadequacies in the original notice for the first hearing, if any existed,

were cured, so that the plaintiff was not prejudiced at the second hearing as ordered by the Court. See, Simard v. Board of Education of Town of Groton, 473 F.2d 988, 994 (2d Cir. 1973).

The hearsay testimony which the Court found to be potentially detrimental to the plaintiff's professional reputation as offered at the first hearing was eliminated in the Court-ordered hearing. The School Board's original failure to make factual findings on the issues was also corrected. The issue before the Court now is not whether the Court would have reached the same conclusions as the Board, but whether the factual record supports their final action.

It is the plaintiff's burden to prove his allegations by a preponderance of the evidence. The Board must judge the credibility of the witness and decide the factual issues for itself. The Court finds that the transcript of the second hearing, does support the Board's findings. The final dismissal action taken by the Board by its letter of June 18, 1974, is supported by the evidence.

The plaintiff has not been denied substantive due process because of any unconstitutional vagueness in the application of the state statute as alleged; nor was he prejudiced by a lack of opportunity to defend against the charges. He was offered the opportunity to present all relevant evidence at

a public hearing and declined. The Board's final dismissal action was not arbitrary, unreasonable, or an abuse of its discretion. Conley v. Board of Education, 143 Conn. 488 (1956)

The Court does find however, that the plaintiff is entitled to be paid by the Town of Bloomfield for his services as a teacher at the Bloomfield Junior High School from the date of his original discharge at the end of the 1973 school year to June 18, 1974, the date of his lawful discharge, at a salary rate commensurate with that which his normal salary would have been for that period, less any earned income in mitigation of damages, together with costs of court. The plaintiff's request for counsel fees is denied. The Court finds that the Board of Education acted in good faith throughout these proceedings. See, Stolberg v.Members of Bd. of Tr. for State Col. of Conn., 474 F.2d 485, 490 (2d Cir. 1973). Absent agreement by counsel on a computation of damages, the matter will be assigned for further hearing February 18, 1975. SO ORDERED.

Dated at Hartford, Connecticut, this 4th day of February, 1975.

T. Emmet Clarie
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROGER diLEO :

-vs- : Civil No. H-162

RICHARD GREENFIELD, et al :

RULING ON HEARING IN DAMAGES

On February 4, 1975, this Court granted summary judgment in favor of the plaintiff to recover damages for the unlawful termination of his employment as a Spanish language teacher in the Bloomfield School System. The Court found that the amount of recovery should be established by computing the annual salary provided by the contract, for the fiscal period commencing with the unlawful discharge on August 1, 1973, to the date of his legal termination on June 18, 1974, minus any earned income during that period in mitigation of damages.

The plaintiff represented at the court hearing, that his annual salary for the 1973-74 year would have been $12,65 . Since the legal cut-off date, June 18, 1974, occurred three working days prior to the end of the 1973-74 school year, he agreed that this 3-day multiple, times the daily wage of $69.34, $208.02, should be deducted from the

total year's salary. This would make the net amount of damages due the plaintiff, $[illegible]5.98, in addition to taxable costs.

The defendants, on the other hand, charge that the plaintiff had a legal duty to minimize these damages, by seeking other commensurate employment. They claim that the plaintiff failed to do this and that his allowable damages should therefore be mitigated by deducting those losses which he could have reasonably avoided.

DiLeo previously taught French, Spanish and Italian during the years 1963-64 and 1965-69, at the Stockbridge School in Stockbridge, Massachusetts. In 1964-65, he taught French and English in Bogota, Columbia, S.A.; and during 1969-73, he taught French and Spanish in the Bloomfield, Connecticut High and Junior High Schools. (Plaintiff's Exhibit B).

Immediately after his unlawful dismissal in Bloomfield, on August 13, 1973, he sent out six job applications for teaching positions in the Hartford area. None of these were productive of employment. On September 12, 1973, he applied at the Goethe Institute in Passau, Germany, as a prospective student to study the German language. His application there was accepted on September 18, 1973, and he registered as a student for the period ending December 31, 1973, and forthwith proceeded to Germany. At no time did he ever attempt to

register for teacher employment at any state employment office; nor did he make inquiry of the State Department of Education employment agency to procure work. While in college as an undergraduate, he had never studied German. However, he decided at this time that the addition of another language might make his professional linguistic teaching talents more in demand. He noted that the Bloomfield Board of Education was planning to add Italian and German to the curriculum and stated that he considered applying there, notwithstanding the circumstances surrounding his job termination.

On January 1, 1974, he did not registered again at the Goethe Institute for the winter quarterly period because his attorney had advised him, that he might be required to return in short notice for a second School Board hearing, relating to his dismissal and he should hold himself open for such a call. On March 28, 1974, the Court did order a new board hearing to be held within thirty days: and this order was complied with by hearings held on May 20, 1974 and June 5, 1974. From January 1, 1974 to the end of April, 1974, diLeo continued to remain a resident in Passau, Germany. The reason which he gave for staying there was because he was "picking up" the speaking of the German language by living in a German language environment.

He stated that he had applied for one or two jobs while in Germany, but was unsuccessful. Teaching jobs in Germany

could not be procured, except on a teacher-exchange basis, when previously arranged with other school boards within the United States. He also considered changing his profession at one point and applied for admission to the London Film School. He felt that with an expected poor recommendation from the Superintendent of the Bloomfield Schools, as a result of his firing, his chances for prospective employment in the teaching field were minimal. While in Germany, he did write one letter to Trinity College, in Hartford, seeking employment in the language field, but received no favorable response.

Discussion of the Law

In calculating damages in this case, the Court must determine whether or not the plaintiff unreasonably removed himself from the job market, by residing outside the country in Passau, Germany, notwithstanding that his personal reason was to broaden his German language background. The Court is of the opinion that in large measure he did unreasonably limit his availability during this period.

> "The correct rule is that where the discharged employee has not used 'reasonable diligence' to find other suitable work, the judgment will be reduced by the amount he would have been able to earn if he used 'reasonable diligence.'" United Protective Workers v. Ford Motor Co., 223 F.2d 49, 52 (7th Cir. 1955).

See also, De Arroyo v. Sindicato De Trabajadores Packinghouse, 302 F.Supp. 224, 229 (D. Puerto Rico 1969), rev'd on other grounds, 425 F.2d 281 (1st Cir. 1970), cert. den., 400 U.S. 877 (1970).

The rule of damages is spelled out clearly in 22 Am. Jur. 2d, Damages § 33, which states in part:

> "All that is required of the nondefaulting party—in measuring his damages—is that he act reasonably so as not unduly to enhance the damages caused by the breach. If the court determines that he has not acted reasonably to avoid damages, the actual award of damages will be reduced by the amount which could have been reasonably avoided. On the other hand, if the court decides that the nondefaulting party has made reasonable efforts to minimize defendant's damages, the award will not be limited by the doctrine of avoidable consequences. Since the primary question is one of the reasonableness of the action of the nondefaulting party, each case must necessarily turn on its own facts." (footnotes omitted).

> "The plaintiff had a duty to mitigate damages, and this duty requires the damages to be reduced not merely by what he actually earned but also by what he reasonably could have earned had he chosen to work." Glazer v. Glazer, 278 F.Supp. 476, 484, (E.D. La. 1968). (footnote omitted).

Cf., Regler v. Board of Ed. of Bearden Sch. Dist., 447 F.2d 1078, 1081 (8th Cir. 1971); and Rolfe v. County Board of Education of Lincoln County, 391 F.2d 77, 81 (6th Cir. 1968).

The Court is not unmindful of the fact that the termination of the plaintiff's teaching job in August made it very

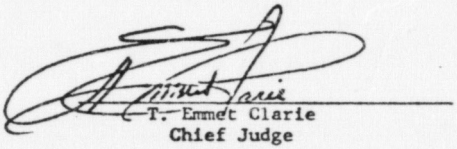
difficult for him to find new employment. Furthermore, the added circumstance of his being fired from his position made the burden much greater. Nevertheless, substitute foreign language teachers were scarce and in great demand. However, it should be noted that the salary for substitute-teachers in the Hartford area is generally $20.00 per day, as against $69.34 per day, when computed on the basis of an annual contract.

When the plaintiff completely removed himself from the normal teaching job market area of Massachusetts, Connecticut and New York and flew to Germany, it cannot be reasonably said, that he continued to search faithfully and diligently for work and was not able to find any. While the evidence disclosed that before he left for Germany, he did attempt to make some effort to obtain employment, thereafter his efforts were greatly limited. Thus, it becomes necessary that this Court reduce his claimed damages, so that they will be consistent with the evidence.

Monetary damages in a case such as this, cannot be computed with scientific accuracy, as to the number of days and dollars which should be declared to be owing. The Court is of the opinion, that because of the plaintiff's lack of reasonable diligence in attempting to find other employment, during part of the contract period, the total salary should

be reduced by fifty per cent (50%); and finds that the plaintiff recover $6,327.00, together with statutory interest from February 4, 1975, the date of entry of the summary judgment, and taxable costs. SO ORDERED.

Dated at Hartford, Connecticut, this 25th day of April, 1975.



T. Emmet Clarie
Chief Judge

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U.S. DISTRICT COURT
HARTFORD, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROGER diLEO :::

:::

vs. ::: CIVIL ACTION NO. H-162

:::

RICHARD GREENFIELD, et al :::

JUDGMENT

This action came on for consideration by the Court by the Honorable T. Emmet Clarie, Chief United States District Judge;

And the Court, after having filed its Memorandum on February 4, 1975, granting summary judgment in favor of the Plaintiff, and, after further hearings on damages, the Court filed its "Ruling On Hearing In Damages" on April 25, 1975, finding for the Plaintiff in the amount of $6,327.00, with statutory interest from February 4, 1975, and taxable costs;

It is accordingly ORDERED and ADJUDGED that the Plaintiff recover the sum of $6,327.00, together with statutory interest from February 4, 1975, and taxable costs.

Dated at Hartford, Connecticut, this 28th day of April, 1975.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: _____
Deputy-in-Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROGER diLEO	)	
	)	CIVIL ACTION NO. H-162
VS.	)	
	)	STIPULATION: RECORD ON APPEAL
RICHARD GREENFIELD, ET AL	)	

In accordance with Rule 11 of the Rules of Appellate Procedure, the parties stipulate as follows:

1. In its consideration of this case the District Court had before it transcripts of hearings conducted before the Bloomfield Board of Education on July 10 and July 23, 1973, and May 20 and June 5, 1974. These transcripts were not formally labeled exhibits but were treated as such.

2. The only portion of said transcripts necessary for consideration of the issues raised on this appeal are the annexed three letters which were introduced at the Board of Education hearing May 20, 1974.

Dated at Hartford, Conn., this 18th day of June, 1975.

Plaintiff, Appellant

By Karl Fleischmann
Karl Fleischmann, Partner
Satter, Fleischmann & Sherbacow

Defendants, Appellees

By
Leo Rosen
Cole & Cole

TOWN OF BLOOMFIELD
On Tunxis Trails

SETTLED 1635 WINTONBURY PARISH ESTABLISHED 1735 TOWN INCORPORATED 1959

Herbert Chester
Superintendent of Schools

Joseph H. O'Donnell
Assistant Superintendent

785 Park Avenue
Bloomfield
Connecticut 06002

June 21, 1973

Mr. Roger diLeo
Bloomfield Junior High School
Bloomfield, Connecticut 06002

Dear Mr. diLeo:

This letter is official notification of your dismissal from the Bloomfield School System effective at the end of this present school year.

This action is taken on the basis of unprofessional conduct on your part in the performance of your duties. Specifically, after two conferences with you in regard to your relationship with students, and being cautioned by Mr. Cronin and myself, you continued to evidence poor practices in your relationship to students.

Yours truly,

Herbert Chester

HERBERT CHESTER
Superintendent of Schools

hc:s

ADMINISTRATION EXHIBIT #1
MAY 20, 1974

ADMINISTRATION EXHIBIT #2
MAY 20, 1974

June 26, 1973

Dr. Herbert Chester
Superintendent of Schools
785 Park Avenue
Bloomfield, Connecticut 06002

Dear Dr. Chester:

I am writing in response to your letter of June 21 and have been advised that as a tenured teacher I have rights under Section 10-151(b), Conn. Gen. Statu., which I wish to assert.

Your letter is too general in its statement for me to understand the nature of the reasons for the action. Will you please advise me of the following:

(a) Where, when and with whom were the two conferences supposedly held between myself and others regarding my relationship with students?

(b) What was said by each participant?

(c) When did each of you and Mr. Cronin caution me?

(d) What was the caution which you gave me?

(e) What poor practices in my relationship to students do you claim that I have evidenced?

(f) What witnesses are there as to any improper conduct on my part?

You should also treat this letter as a request for a hearing before the Board of Education.

I have retained the law firm of Satter, Fleischmann & Sherbacow to represent me in this matter. Will you please address your reply to them within five days after your receipt of this notice (I am hand delivering to you June 26,1973).

They are authorized in my absence to represent me in all matters connected with your action against me.

Very truly yours,

Roger diLeo

Roger diLeo

KARL FLEISCHMANN
ATTORNEY AT LAW

SATTER, FLEISCHMANN & SHERBACOW
[illegible]
Tel. 547-0159

BLOOMFIELD BOARD OF EDUCATION

242-4751
705 PARK AVE. BLOOMFIELD, CONN. 06002

July 2, 1973

Mr. Roger diLeo
c/o Atty. Karl Fleischmann
Satter, Fleischmann & Sherbacow
60 Washington Street
Hartford, Connecticut 06106

Dear Mr. diLeo:

The Board of Education is meeting tomorrow evening (July 3, 1973) and at that time they will establish a date for the hearing and you will receive notification.

Your dismissal is predicated on Section 10-151 (b) (6) "other due and sufficient cause", specifically, improper conduct towards students on several occasions.

Very truly yours,

HERBERT CHESTER
Superintendent of Schools

hc:s

ADMINISTRATION EXHIBIT #3
MAY 20, 1974

SUPREME COURT

April Term, 1975

JESSE MITCHELL ET AL. v. FRANCIS J. KING ET AL.

Action for an injunction restraining the defendants from continuing the expulsion of the named plaintiff from a public school, and for damages, brought to the Court of Common Pleas in Fairfield County and tried to the court, *Hanrahan, J.*; judgment for the plaintiffs and appeal by the defendants. *Error in part; judgment modified.*

Richard M. Sheiman, deputy city attorney, for the appellants (defendants).

Gerald T. Weiner, for the appellees (plaintiffs).

LOISELLE, J. The named plaintiff, a minor, hereinafter designated the plaintiff, was permanently expelled from high school as a result of his alleged participation in a gang assault upon a student. The alleged attack occurred on September 28, 1972, on the grounds of Central High School in Bridgeport prior to the commencement of the school day. During the period of the plaintiff's expulsion his mother expended the sum of $859 for private school tuition. In an action brought to the Court of Common Pleas, judgment was rendered in favor of the plaintiff enjoining the defendant board of education from continuing the expulsion and awarding $850 to the plaintiff's mother, Anna Mitchell, who had joined personally as a plaintiff in the action. The defendants have appealed from that judgment.

In rendering judgment for the plaintiff, the court based its decision solely on the ground that § 10-234 of the General Statutes, which authorizes a school board to expel any student found guilty of "conduct inimical to the best interests of the school"[1] and under which the plaintiff was expelled, was invalid as an illegal delegation of legislative power. The legislative power to delegate is not unlimited. To be constitutionally sustained, "it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests as to such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interest and private rights shall have due consideration." *State* v. *Stoddard*, 126 Conn. 623, 628, 13 A.2d 586. No declaration of legislative policy is contained in § 10-234; however, title 10 of the General Statutes, of which § 10-234 is a part, declares the state's special interest in the education of children. It can hardly be doubted that the statute in question was enacted pursuant to the policies and aims expressed in title 10 and more particularly articulated in §§ 10-4a and 10-220. *Roan* v. *Connecticut Industrial Building Commission*, 150 Conn. 333, 339-40, 189 A.2d 399.

It is true that the modern tendency is liberal in approving delegation under broad regulatory standards so as to facilitate the operational functions of administrative boards or commissions, and it is unrealistic to demand detailed standards which are impracticable. *Forest Construction Co.* v. *Planning & Zoning Commission*, 155 Conn. 669, 679, 236 A.2d 917. A statute, however, which forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. *Baggett* v. *Bullitt*, 377 U.S. 360, 367, 84 S. Ct. 1316, 12 L. Ed. 2d 377; *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322. Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Also, if arbitrary and discriminatory enforcement is to be prevented, laws must provide adequately delineated standards for those who apply them. It is a basic principle of due process that a statute is void for vagueness if its prohibitions are not clearly defined. See *Lanzetta* v. *New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888; see, generally, note, "The Void-For-Vagueness Doctrine in the Supreme Court," 109 U. Pa. L. Rev. 67. A vague statute may inhibit the exercise of constitutionally protected freedoms by having persons "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, supra, 372.

Distinct from, but often congruent with, the defect of vagueness is that of statutory overbreadth, that is, where the reach of the statutory language, no matter how precise, prohibits conduct protected by the constitution. See *Zwickler* v. *Koota*, 389 U.S. 241, 249-50, 88 S. Ct. 391, 19 L. Ed. 2d 444; *Grayned* v. *Rockford*, 408 U.S. 104, 114, 92 S. Ct. 2294, 33 L. Ed. 2d 222; see, generally, note, "The First Amendment Overbreadth Doctrine," 83 Harv. L. Rev. 844. The claim of the plaintiffs that the statutory language of § 10-234 is overbroad need not be discussed in view of the disposition made on the issue of vagueness.

[1] General Statutes § 10-234 provides in pertinent part: "The board of education of any town may expel from school any pupil regardless of age who after a full hearing is found guilty of conduct inimical to the best interests of the school."

The court's decision as to the unconstitutionality of § 10-234 was not based on its application to the defendant. Rather, the court found the statute to be invalid as an illegal delegation because the language, "conduct inimical to the best interests of the school," was too vague and indefinite to be regarded as a standard for expulsion of students. A statute must be construed as a whole since particular words or sections of the statute, considered separately, may be "lacking in precision of meaning to afford a standard sufficient to sustain" it. *Devaney* v. *Board of Zoning Appeals*, 132 Conn. 537, 541, 45 A.2d 828; see *Forest Construction Co.* v. *Planning & Zoning Commission*, supra, 679. The "best-interest" standard has been widely used and well understood in our law; *In re Appeal of Kindis*, 162 Conn. 239, 243, 294 A.2d 316; however, when juxtaposed with "inimical" the standard must be examined to determine if it conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. What the phrase "inimical to the best interests" may mean to different persons is virtually unlimited. The descriptions and illustrations used in Webster's New International Dictionary (3d Ed.) to indicate the meaning of "inimical" and its synonym "adverse" are numerous and varied. Its meaning may range from unsympathetic in tendency to having the disposition of an enemy. A term so varied in meaning is not sufficient to constitute definition, inclusive or exclusive.

This court is mindful of the comprehensive authority of school officials to prescribe and control conduct in schools and the need for flexibility and reasonable breadth in statutes which guide them in their duties and which authorize them to accomplish educational ends. That authority, however, must be consistent with constitutional safeguards. See *Goss* v. *Lopez*, U.S. , 95 S. Ct. 729, 42 L. Ed. 2d 725; *Tinker* v. *Des Moines School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731. Section 10-234, when read in the light of the legal principles enunciated, is unconstitutionally vague on its face. It does not give fair notice that certain conduct is proscribed; it makes no distinction between student conduct on or off school property, during school hours or while school is not in session. It fails to provide any meaningful indication as to what range of behavior would legitimately subject a student to expulsion. Thus, the time, the place, and the nature of student conduct that might be deemed "inimical to the best interests of the school" would lie entirely within the subjective discretion of the board of education. A more specific legislative standard is required. See *Coates* v. *Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214. "[T]he vice to be guarded against is arbitrary action by officials. The fact that a particular instance or action appears not arbitrary does not save the validity of the authority under which the action was taken." *Niemotko* v. *Maryland*, 340 U.S. 268, 285, 71 S. Ct. 325, 95 L. Ed. 267 (concurring opinion of Frankfurter, J.). The court was not in error in concluding that General Statutes § 10-234 was invalid as an illegal delegation of legislative power.

The defendants have assigned as error the court's award of damages, and both parties have briefed the issue of the defendants' immunity from liability. That issue will be treated as presented and briefed by the parties. It is the contention of the defendants that, as the suit was brought against them in their official capacity as public officers of the town of Bridgeport, they are immune from liability. The plaintiffs claim that as the defendants were sued in their official capacities, the real party in interest is the board of education of Bridgeport. The judgment is explicit that it is the board that is enjoined from continuing the expulsion and that it is the board that is ordered to reinstate the plaintiff in the school, "together with a judgment of $850.00 in favor of the plaintiff Anna Mitchell."

A board of education is an agency of the state in charge of education in a town. *Murphy* v. *Berlin Board of Education*, Conn. (36 Conn. L.J., No. 24, pp. 1, 3); *Board of Education* v. *Board of Finance*, 127 Conn. 345, 349, 16 A.2d 601. As such an agency, it is acting in a governmental, not a proprietary, capacity. *Norwalk Teachers' Assn.* v. *Board of Education*, 138 Conn. 269, 275-76, 83 A.2d 482. In functioning under General Statutes § 10-234, the board is acting in a quasi-judicial capacity. To reach a decision, it must weigh evidence and reach conclusions. The determination of issues of fact and credibility of witnesses are matters within its province. *Conley* v. *Board of Education*, 143 Conn. 488, 492, 123 A.2d 747. It is clear that governmental immunity is a defense to the liability of the board under these circumstances. See *Wood* v. *Strickland*, U.S. , 95 S. Ct. 992, 999 n.9, 1000, 42 L. Ed. 2d 214; *Norwalk Teachers' Assn.* v. *Board of Education*, supra; annot., 33 A.L.R.3d 703-87. The court was in error in awarding damages to the plaintiff Anna Mitchell.

There is error only as to the judgment awarding damages to the plaintiff Anna Mitchell; the judgment as to her is set aside and as to her the case is remanded with direction to render judgment for the defendants.